

AGRICULTURAL LABOR RELATIONS BOARD

Final Text of Regulations to Implement SB 1156 and AB 2596

CHAPTER 4. MANDATORY MEDIATION AND CONCILIATION

§ 20400. Filing of Declaration Requesting Mandatory Mediation and Conciliation

(a) Where the certification issued prior to January 1, 2003:

A declaration pursuant to Labor Code section 1164, subdivision (a)(1) may be filed with the Board by either the agricultural employer or the certified labor organization at any time at least 90 days after a renewed demand to bargain, as defined in subdivision (2) below. The declaration shall be served and filed in accordance with sections 20160, 20164, 20166, and 20168. The declaration shall be signed under penalty of perjury by an authorized representative of the filing party, shall state that the parties are subject to an existing certification and have failed to reach a collective bargaining agreement, and shall state that (A) the parties have failed to reach agreement for at least one year after the date on which the labor organization made its initial request to bargain, (B) the employer has committed an unfair labor practice, describing the nature of the violation, and providing the corresponding Board decision number or case number, (C) the parties have not previously had a binding contract between them, and (D) the employer has employed or engaged 25 or more agricultural employees during a calendar week in the year preceding the filing of the declaration. In addition, the declaration shall be accompanied by any documentary or other evidence that supports the above statements and establishes the date of the renewed demand to bargain.

(1) The unfair labor practice referred to above is one where a final Board decision has issued or where there is a settlement agreement that includes an admission of liability.

(2) The renewed demand to bargain referred to above is one that occurred on or after January 1, 2003.

(b) Where the certification issued after January 1, 2003:

A declaration pursuant to Labor Code section 1164, subdivision (a)(2) may be filed with the Board by the agricultural employer or the certified labor organization at any time at least 180 days after the initial request to bargain by either party following the certification. The declaration shall be served and

filed in accordance with sections 20160, 20164, 20166, and 20168. The declaration shall be signed under penalty of perjury, shall state that the parties are subject to an existing certification and have failed to reach a collective bargaining agreement, shall provide the date of the initial request to bargain, and shall state that the employer has employed or engaged 25 or more agricultural employees during a calendar week in the year preceding the filing of the declaration. In addition, the declaration shall be accompanied by any documentary or other evidence that supports the above statements.

(c) For the purpose of determining the number of declarations permitted to be filed by a labor organization, the term "party" as used in Labor Code section 1164.12 shall refer to the labor organization named in the Board's certifications.

Authority: Section 1144, Labor Code

Reference: Sections 1164, 1164.11, and 1164.12, Labor Code

§ 20401. Answer to Declaration

(a) Within three (3) days of service of a declaration, the other party to the collective bargaining relationship (or alleged bargaining relationship) may file an answer to the declaration. The answer shall be served and filed in accordance with sections 20160, 20164, 20166, and 20168. The answer shall be signed under penalty of perjury by an authorized representative of the filing party, and shall identify any statements in the declaration that are disputed. In addition, the answer shall be accompanied by any documentary or other supporting evidence. If it is claimed that the employer has not engaged 25 or more agricultural employees during any calendar week in the year preceding the filing of the declaration seeking referral to mandatory mediation, payroll records sufficient to support the claim shall be submitted with the answer. Payroll records shall be submitted in electronic form if kept in that form in the normal course of business.

(b) All statements in a declaration that are not expressly denied in the answer shall be deemed admitted.

Authority: Section 1144, Labor Code

Reference: Sections 1164, 1164.11, and 1164.12, Labor Code

§ 20402. Evaluation of the Declaration and Answer

(a) The Board shall dismiss any declaration that fails to include all of the requirements of section 20400, subdivision (a) or (b), as applicable. A declaration dismissed under this regulation shall not be included in the total of seventy-five (75) declarations permitted under Labor Code section 1164.12

(b) If no answer to the declaration is timely filed, or if the answer admits the truth of all factual prerequisites to the validity of the declaration, the Board shall immediately issue an order directing the parties to mandatory mediation and conciliation and request a list of mediators from the California State Mediation and Conciliation Service, in accordance with Labor Code section 1164, subdivision (b).

(c) Where a timely filed answer disputes the existence of any of the prerequisites for referral to mediation, the Board shall attempt to resolve the dispute on the basis of the parties' filing and/or upon investigation. The Board shall issue a decision within 5 days of receipt of the answer either (1) dismissing the petition, or (2) referring the matter to mediation, or (3) scheduling an expedited evidentiary hearing to resolve any factual issues material to the question of the existence of any of the prerequisites.

(d) Where an evidentiary hearing is ordered by the Board pursuant to subdivision (c) above, the hearing shall be in accordance with the following procedures:

(1) Notice of hearing shall be served in the manner required by Section 20164.

(2) Parties shall have the right to appear in person at the hearing, or by counsel or other representative, to call, examine and cross-examine witnesses, and to introduce all relevant and material evidence. All testimony shall be given under oath.

(3) The hearings shall be reported by any appropriate means designated by the Board.

(4) The hearing shall be conducted by a member(s) of the Board, or by an assigned Administrative Law Judge, under the rules of evidence, so far as practicable; while conducting a hearing the Board member(s) or Administrative Law Judges shall have all pertinent powers specified in Section 20262.

(5) Requests for discovery and the issuance and enforcement of subpoenas shall be governed by the provisions of section 20406 of these regulations, with the exception that references to "notice of mediation" shall mean notice of hearing, "mediator" shall mean the Board member(s) or assigned Administrative Law Judges who will conduct the hearing, references to "mediation" shall mean the expedited evidentiary hearing provided for in this section.

(6) The assigned Administrative Law Judge or member(s) of Board who conducted the hearing shall file a decision with the Executive Secretary within ten (10) days from receipt of all the transcripts or records of the proceedings. The decision shall contain findings of fact adequate to support any conclusions of law necessary to decide the matter. If the hearing was conducted by the full Board, the decision shall constitute that of the Board.

(A) Upon the filing of the decision, the Executive Secretary shall serve copies of the decision on all parties pursuant to section 20164.

(B) Within ten (10) days after the service of the decision of the Administrative Law Judge, or of less than the full Board, any party may file with the Executive Secretary for submission to the Board the original and six (6) copies of exceptions to the decision or any part of the proceedings, with an original and six (6) copies of a brief in support of the exceptions, accompanied by proof of service, as provided in sections 20160 and 20168. The exceptions shall state the ground of each exception, identify by page number that part of the decision to which exception is taken, and cite to those portions of the record that support the exception. Briefs in support of exceptions shall conform in all ways to the requirements of sections 20282(a)(2). The Board shall issue its decision within 10 days of receipt of the exceptions.

(7) Upon its resolution of the disputed facts, the Board either shall issue an order dismissing the declaration or an order directing the parties to mandatory mediation and conciliation and request a list of mediators from the California State Mediation and Conciliation Service, in accordance with Labor Code section 1164, subdivision (b).

Authority: Section 1144, Labor Code

Reference: Sections 1151, 1164, 1164.11, and 1164.12, Labor Code

§20403. Selection of Mediator

Within seven (7) days of the receipt of the list of nine mediators, the parties shall either select a mediator from the list in accordance with Labor Code section 1164, subdivision (b), or mutually designate a mediator from a list of all qualified mediators maintained by the State Mediation and Conciliation Service.

Authority: Section 1144, Labor Code

Reference: Section 1164, Labor Code

§20404. Disqualification of Mediator

(a) Any mediator selected pursuant to Labor Code section 1164, subdivision (b), shall be subject to disqualification for bias, prejudice, or interest in the outcome of the proceeding.

(b) Whenever a mediator shall have knowledge of any fact, which by reason of bias or prejudice makes it appear probable that a fair and impartial mediation, within the meaning of Labor Code section 1164, et seq., cannot be held before him or her, it shall be his or her duty to immediately notify the Executive Secretary, setting forth all reasons for his or her belief.

(c) Prior to the first mediation session, any party may request the mediator disqualify himself or herself whenever it appears probable that a fair and impartial mediation cannot be held by the selected mediator. The request shall be under oath and shall specifically set forth all facts constituting the grounds for the disqualification of the mediator.

(1) If the mediator admits his or her disqualification, such admission shall be immediately communicated to the Executive Secretary, who shall refer the matter to the State Mediation and Conciliation Service for selection of another mediator in accordance with section 20403.

(2) If the mediator does not disqualify himself or herself and withdraw from the proceeding, he or she shall so rule in writing or on the record, state the grounds for the ruling, and proceed with the mediation. The party requesting the disqualification may, upon issuance of the mediator's report, file for review of the mediator's report on the grounds set forth in Labor Code section 1164.3, subdivision (e), and in accordance with section 20408 of these regulations.

Authority: Section 1144, Labor Code

Reference: Sections 1164 and 1164.3, Labor Code

§20405. Notice of Mediation

The mediator shall appoint a time and place for the mediation and cause notice thereof to be served personally or by registered or certified mail on the parties to the mediation not less than fifteen (15) days before the mediation. The mediation shall commence within thirty (30) days of the selection of the mediator, or as soon as practical. Appearance at the mediation shall waive the right to notice.

Authority: Section 1144, Labor Code

Reference: Section 1164, Labor Code

§20406. Discovery

(a) Witness and Document Lists. Either party shall within fifteen (15) days of receipt of a Board order directing the parties to mandatory mediation and conciliation have the right to demand in writing, served personally or by registered or certified mail, that the other party provide a list of witnesses it intends to call designating which witnesses will be called as expert witnesses and a list of documents it intends to introduce on the record at the mediation. A copy of the demand shall be served on the mediator.

(1) Witness and document lists shall be served personally or by registered or certified mail on the requesting party within ten (10) days of service of the request. Copies of the lists shall be served on the mediator.

(2) Listed documents shall be made available for inspection and copying at reasonable times prior to the hearing.

(3) Time limits provided herein may be waived by mutual agreement of the parties if approved by the mediator.

(4) The failure to list a witness or a document shall not bar the testimony of an unlisted witness or the introduction of an undesignated document at the mediation, provided that good cause is shown, as determined by the mediator. The introduction of bona fide rebuttal evidence shall constitute good cause.

(b) Subpoenas. After the appointment of a mediator, and prior to the commencement of mediation, any member of the Board, or the Executive Secretary, or any person authorized by the Board, shall upon the ex parte

request of a party to a mediation, issue subpoenas requiring the attendance and testimony of witnesses and or the production of any materials, including, but not limited to, books, records, correspondence or documents in their possession or under their control. Requests for subpoenas at or after the first mediation session shall be made to the mediator.

(1) The subpoena shall show on its face the name, address, and telephone number of the party at whose request the subpoena was issued. A copy of a declaration under penalty of perjury shall be served with a subpoena duces tecum showing good cause for the production of the matters or things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues tendered by the party and stating that the party or witness has the desired matters or materials in his or her possession or under his or her control. Information concerning the financial condition of the employer and its ability to meet the costs of the contract shall not be discoverable except where the employer makes a plea of inability to meet the union's wage and benefit demands; however, other financial information may be discoverable if necessary to verify or evaluate a party's claims or proposals.

(2) Service of subpoenas shall be made personally or by registered or certified mail. The service shall be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

(3) Any person on whom a subpoena is served who does not intend to comply shall, within 5 days, after the date of service, petition the mediator in writing to revoke the subpoena. The petition shall be sent to the mediator by registered or certified mail and served by the same means upon the party requesting the subpoena. The petition to revoke shall explain with particularity the grounds for objecting to each item covered by the petition, which shall include a copy of the subpoena. The mediator shall have the discretion, where good cause is shown, to modify the time requirements regarding subpoenas and subpoena compliance.

(4) The mediator shall revoke the subpoena in whole or in part if the evidence required to be produced does not relate to any matter in question or does not describe with sufficient particularity the evidence required to be produced or the testimony or records sought are privileged or otherwise protected or if the subpoena is otherwise invalid.

(5) The mediator shall rule on all petitions to revoke. Upon the failure of any person to comply with a ruling by the mediator enforcing a subpoena, the

mediator may request the Board apply for a court order enforcing the subpoena.

(c) In addition to the limitations set forth above, discovery requests shall be considered untimely if submitted prior to the identification of issues required by section 20407, subdivision (a)(1).

(d) Enforcement of Discovery. For the purpose of enforcing the duty to make discovery, to produce evidence or information, including books and records, and to produce persons to testify, the mediator may draw adverse inferences or impose terms, conditions, or sanctions upon a party. For the purposes of this section, "party" shall be deemed to include the officers, directors, agents, and employees of such party. The files, books, and records of each officer, director, agent, or employee shall be deemed to be in the possession and control of, and capable of production by, such party.

Authority: Section 1144, Labor Code

Reference: Sections 1151 and 1164, Labor Code

§20407. The Mediation and Conciliation Process

(a) Mediation shall proceed in accordance with Labor Code section 1164, subdivisions (b), (c), and (d). The 30-day periods referred to in Labor Code section 1164, subdivision (c) shall commence on the date of the first scheduled mediation session, shall proceed for consecutive calendar days, and shall not include any pre-mediation conference. The 30-day timelines may be waived by mutual agreement of the parties and with the approval of the mediator. Pre-mediation conferences may be scheduled at the discretion of the mediator.

(1) No later than seven (7) days after receipt of a Board order directing the parties to mandatory mediation and conciliation, and prior to their first discovery requests pursuant to section 20406 above, each party shall identify for the mediator those issues that are in dispute and those that are not in dispute, identify the standards which they propose to resolve the disputed issues, and provide agreed upon contract language for those issues not in dispute. This information shall be served on the other party immediately and on the mediator upon his or her selection. During the mediation, the parties shall provide the mediator with a detailed rationale for each of its contract proposals on issues that are in dispute, and shall provide on the record supporting evidence to justify those proposals. The failure of any party to participate or cooperate in the mediation and conciliation process shall not

prevent the mediator from filing a report with the Board that resolves all issues and establishes the final terms of a collective bargaining agreement, based on the presentation of the other party.

(2) The mediator shall preside at the mediation, shall rule on the admission and exclusion of evidence and on questions of procedure and shall exercise all powers relating to the conduct of the mediation. All evidence upon which the mediator relies in writing the report required by section 1164, subdivision (d) shall be preserved in an official record through the use of a court reporting service or, with the consent of both parties and the approval of the mediator, by a stipulated record. The mediator shall cite evidence in the record that supports his or her findings and conclusions. The mediator shall retain the discretion to go off the record at any time to clarify or resolve issues informally. All communications taking place off the record shall be subject to the limitations on admissibility and disclosure provided by Evidence Code section 1119, subdivisions (a) and (c), and shall not be the basis for any findings and conclusions in the mediator's report.

(3) The parties shall have the right to be represented by counsel or other representative.

(4) The parties to the mediation are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing, but rules of evidence and rules of judicial procedure need not be observed. The testimony of witnesses shall be given under oath.

(b) In determining the issues in dispute, the mediator may consider those factors commonly applied in similar proceedings, such as, but not limited to:

(1) The stipulations of the parties.

(2) The financial condition of the employer and its ability to meet the costs of the contract in those instances where the employer makes a plea of inability to meet the union's wage and benefit demands.

(3) Comparison of corresponding wages, benefits, and terms and conditions of employment in collective bargaining agreements covering similar agricultural operations with similar labor requirements.

(4) Comparison of corresponding wages, benefits, and terms and conditions of employment in comparable firms or industries in geographical areas with similar economic conditions, considering the size of the employer, the skills, experience, and training required of the employees, as well as the difficulty and nature of the work.

(5) The average consumer prices for goods and services, commonly known as the Consumer Price Index, and the overall cost of living in the area where the work is performed.

(c) The mediator shall issue his or her report within twenty-one (21) days of the last mediation session. Upon completion of the mediator's report, the report shall be served on the parties and filed with the Board in accordance with sections 20164 and 20168. Upon the filing of the report, the mediator also shall transfer the official record of the proceeding to the Board.

Authority: Section 1144, Labor Code
Reference: Section 1164, Labor Code

§20408. Board Review of the Mediator's Report

(a) Within seven (7) days of the filing of first or second report by the mediator, either party may file a petition for review of the report. The petition shall be served and filed in accordance with sections 20160, 20164, 20166, and 20168. The petition shall be based on any one or more of the grounds set forth in Labor Code section 1164.3, subdivision (a) or subdivision (e). The petitioning party shall specify the particular provisions of the mediator's report for which it is seeking review, shall specify the specific grounds authorizing review, and shall cite the portions of the record that support the petition. In the event the petition is based on the grounds set forth in Labor Code section 1164.3, subdivision (e), the petitioning party may attach declarations that describe pertinent events that took place off the record, if necessary to establish the grounds for review stated in the petition.

(b) The Board shall issue a decision on the petition in accordance with Labor Code section 1164.3. Where the petition is based on the grounds specified in Labor Code section 1164.3, subdivision (e), and the Board determines that there are material facts in dispute that are outside the official record of the mediation, the Board may order an expedited evidentiary hearing to resolve the dispute, to be conducted in accordance with the procedures set forth in section 20402 of these regulations.

(c) Where the Board orders additional mediation pursuant to Labor Code section 1164.3, subdivision (c), the mediation shall commence within thirty (30) days of the issuance of the Board's order, or as soon as practical.

Authority: Section 1144, Labor Code
Reference: Section 1164.3, Labor Code

Requirement to Submit Contracts to Board

CHAPTER 4.5. SUBMISSION OF COLLECTIVE BARGAINING AGREEMENTS

§20450. Submission of Copies of Collective Bargaining Agreements to the Board

In order to facilitate the calculation of bargaining makewhole awards pursuant to Labor Code section 1160.3 and the administration of the Mandatory Mediation and Conciliation process provided in Labor Code sections 1164 through 1164.14, certified labor organizations and agricultural employers shall submit to the Board a copy of the full text of any collective bargaining agreements to which they have agreed, where the effective date of the agreement is on or after the effective date of this regulation.

Authority: Section 1144, Labor Code

Reference: Section 1160.3 and Sections 1164-1164.14, Labor Code